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One Year Review of Criminal Law

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ONE YEAR REVIEW OF CRIMINAL LAW

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The cases which form the content of this review are those which were decided between September of 1955, and January of 1957.

Since the publication of the last yearly review, several cases have been presented for appeal in which the Supreme Court has again admonished counsel that the status of the record on appeal must meet the test in all cases. In *McConnell v. People*,[1] Justice Knauss said:

> "Writs of error in criminal cases are governed by the rules pertinent to such cases. It is incumbent on counsel for a defendant in a criminal case to file in this Court of an Abstract of Record and an assignment of errors relied upon for reversal."[2]

In its latest pronouncement on the subject, the court, in *Rochon v. People*,[3] noted that there had been no compliance whatever with the requirement of the rules governing the practice in criminal cases and said, "Again we say that the Rules of Civil Procedure do not apply in criminal cases."[4]

In the case of *People v. Read*,[5] the court was confronted with an appeal by the State in a case where the justice court had granted a motion to quash a complaint on the ground that the State had failed to file an information or a true bill returned by a grand jury. In that case the court held that writs of error shall lie on the State's behalf to review proceedings before a justice of the peace, there being no limitation confining the operation of the statute relating to writs of error to courts of record.

In *Peterson v. People*,[6] the Supreme Court held that before error can be charged to a trial court it must have been afforded opportunity to commit the charged error with a like opportunity for correction thereof, and a motion for a new trial which is based on the general objection that the verdict of guilty was not supported by the evidence, was contrary to the evidence, and was not supported by law applicable to the offense charged, did not properly or specifically direct attention of the trial court to any specific error and therefore there was no basis for finding error in the trial court's denial of such motion.

In *Hardy v. People*,[7] the court held that where an amended and supplemental motion for a new trial following a conviction of

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[1] 132 Colo. 295, 287 P.2d 659 (1955).
[2] *Id.* at 296, 827 P.2d at 660.
[3] 9 Colo. Bar Ass'n Adv. Sh. 123 (Jan. 14, 1957).
[4] *Id.* at 124.
[5] 132 Colo. 390, 288 P.2d 347 (1955).
[6] 133 Colo. 516, 297 P.2d 529 (1956).
[7] 132 Colo. 201, 292 P.2d 973 (1956).

murder was made after the term of court had ended, the court was without jurisdiction to entertain such a motion.

Although the Supreme Court did rule on the merits of the case based upon the assignments of error presented in the case of *Graham v. People,*[8] Justice Moore in a specially concurring opinion questioned the right of the court to decide the case, stating: "I sincerely believe that we embark upon an unchartered course when we take jurisdiction of this case under these circumstances."[9] The circumstances to which he referred were that the defendant had not authorized any proceedings in the Supreme Court to review the conviction, that the record conclusively showed that he had protested the action of counsel in causing the writ of error to issue, and had on two separate occasions demanded in writing that the proceedings in the Supreme Court be stopped and that the judgment of the district court be permitted to stand. In view of these circumstances, Justice Moore concluded that the writ of error should be dismissed. It should be noted that in all of the aforementioned decisions, the court was considering matters entirely procedural in nature. Further decisions or parts of decisions relating to purely procedural matters were the following:

In *People v .Read,* referred to above, the court held that prosecution of cases before a justice of the peace need not be had on information filed by a district attorney, or by a grand jury indict-

[8] 302 P.2d 737 (1956).
[9] *Id.* at 749.

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ment, but it may be prosecuted on warrant issued on oath or verified complaint of any competent person, and that the complaint need not contain a statement that one signing it on oath is a competent witness or has personal knowledge of the facts charged.

In *Cooper v. People,*[10] the Supreme Court ruled that it was error to fail to permit the defendant to withdraw his plea of not guilty for the purpose of permitting argument on a motion to quash a grand jury indictment on the ground of duplicity inasmuch as the only way of presenting the question of duplicity is by motion to quash, which must be made before trial, and the failure of the court to permit the withdrawal of the plea, under the facts of this case, constituted an abuse of discretion.

In the case of *Brown v. People,*[11] after the jury had been selected and sworn in a murder trial, the judge learned that the clerk had intentionally concealed the ticket bearing the name of a juror on the panel so that his name would not and could not be drawn, whereupon, the court, on its own motion, declared a mistrial and discharged the jury. The defendant, in a subsequent habeas corpus proceeding contended that the court was not legally justified in declaring a mistrial, and since the jury had already been selected and sworn, he had been placed in double jeopardy.

The Supreme Court held the action of the trial court to be legally justified, stating: "When any irregularity worthy of notice and capable of correction appears, a declaration of mistrial is legally justified."[12]

The court further stated:

> "A court of justice is invested with the authority to discharge a jury from giving any verdict whenever in the Court's opinion there is manifest necessity for such act *or the ends of public justice* would otherwise *be defeated,* and that such is within the discretion of the trial court and is not subject to review in the absence of abuse of discretion. . . . The fact that a juror was withdrawn is not of itself sufficient to indicate jeopardy, since a court of review will not presume an abuse of discretion on the part of the trial court."[13]

Procedural matters dealing with the withdrawals of pleas have also again come to the attention of the Supreme Court. In *Matz v. People,*[14] the defendant, charged with burglary and conspiracy, wanted to withdraw a plea of not guilty and enter a plea to the charges. The district attorney filed a written motion to dismiss the charges on the ground that the defendant had been filed on in another action based upon the same facts and that the new information contained additional counts (habitual criminal), not charged in the first information. Defendant objected to the dismissal, which the trial court permitted.

[10] 132 Colo. 548, 291 P.2d 388 (1955).
[11] 132 Colo. 561, 291 P.2d 680 (1955).
[12] *Id.* at 569, 291 P.2d at 684.
[13] *Id.* at 568, 291 P.2d at 682.
[14] 133 Colo. 45, 291 P.2d 1059 (1956).

In *Meier v. People*,[15] the defendant entered a plea of nolo contendere to the charge of involuntary manslaughter. When it became apparent that the court was not inclined to grant probation, she asked leave to withdraw her plea of nolo contendere and again enter a plea of not guilty. This was refused and she was subsequently sentenced.

In both cases the Supreme Court held the principle to be the same, that an application to change a plea is addressed to the sound discretion of the trial court, that its ruling will be reversed only for an abuse of discretion, and that there had not been an abuse of discretion in either case. In the *Matz* case the court further held that the defendant could not possibly suffer prejudice by judgment of dismissal. The fact that the indirect result might be the filing of the same information plus habitual criminal counts does not alter the situation. The statute[16] does not mean that the court is compelled to accept a plea of guilty when made or offered. In the *Meier* case the court further held that whether probation shall be granted is a matter that rests exclusively in the discretion of the trial court, that the Supreme Court will not order probation in any case in which it has been denied by the trial court, and that the order of the trial court granting or denying probation is no part of the judgment to which a writ of error may be directed.

In *Martinez v. People*,[17] a murder case, on appeal counsel ad-

[15] 133 Colo. 338, 296 P.2d 232 (1956).
[16] Colo. Rev. Stat. Ann. § 39-7-8 (1953).
[17] 299 P.2d 510 (1956).

vanced an argument that an adequate representation of an accused in a murder case requires the entry of a plea of "not guilty by reason of insanity." The Supreme Court said that this argument was without merit, and that they were not advised of any case in any jurisdiction which was authority for that proposition.

The aforesaid cases, although decided primarily on the question of withdrawal of pleas, were also indirectly concerned with the matter of punishment. Some additional cases were appealed in which the matter of punishment imposed was attacked. In the case of *Smalley v. People*,[18] the defendant was serving a life sentence in the penitentiary as an habitual criminal. One of the counts under which he had been convicted was based on a sentence to the state reformatory when he was nineteen years old and for a first offense. The court considered the statutes involved,[19] the section of the Constitution which reads as follows:

"The term felony, wherever it may occur in this Constitution, or the laws of this State, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, and none other."[20] In a four to three decision, the court held that a "felony" under our constitution is based upon the place of confinement, and the test by which an offense is determined as to whether it is a felony or not, is by the punishment prescribed, and that this reformatory sentence does not suffice for a felony conviction.

In a specially concurring opinion,[21] Justice Moore wrote:

> "Under the constitution definition a 'criminal offense' cannot be classed as a felony unless the person convicted thereof could be lawfully sentenced to the penitentiary. The law does not punish 'offenses.' It punishes individuals who commit offenses. . . ."[22]

In *Rochon v. People*, above mentioned, the court held that a sentence of eight to fifteen years for a conviction of aggravated robbery was not too harsh inasmuch as a sentence of up to life could have been imposed. In *Serra v. Cameron*,[23] where the muni-

[18] 304 P.2d 902 (Colo. 1957).
[19] Colo. Rev. Stat. Ann. §§ 39-10-1, 39-13-1 (1953).
[20] Colo. Const., Art. XVIII, § 4 (1876).
[21] 9 Colo. Bar. Ass'n Adv. Sh. 100.
[22] *Id.* at 101.
[23] 133 Colo. 115, 292 P.2d 340 (1956).

cipal court had convicted the defendant and suspended sentence and therafter vacated suspension, the defendant's imprisonment under the sentence was held lawful irrespective of whether the municipal court had authority to suspend the original sentence.

In *Bustamante v. People*,[24] the defendant was convicted of converting public funds. The statute[25] provides for imprisonment for not less than five years. It does not expressly state that the imprisonment shall be in the penitentiary. The court held that imprisonment in the penitentiary is unlawful unless expressly so provided in the statute. Doubtless, under the rule laid down in *Brooks v. People*,[26] the offense, although providing for a minimum sentence of five years, is but a misdemeanor.

Three of the aforementioned cases were also concerned with matters relating to juries and jurors. In the *Bustamante* case the trial court sustained the prosecution's challenge for cause, after all peremptory challenges had been exhausted, on the ground that the juror's wife's sister was married to a person who might be called as a witness and that the same juror's employer was bondsman for the defendant. The Supreme Court, in reversing the case, held that sustaining the challenge was an abuse of discretion which affected the substantial rights of the defendant, and inasmuch as the voir dire examination disclosed no statutory ground[27] for challenge for cause, amounted to giving the State an additional peremptory challenge.

In the *Graham* case, one of the points raised was that the defendant had filed a motion to waive a jury and be tried by the court, which motion was denied. The court held that the motion was properly denied; that in a trial for murder the mandatory provisions of the statute[28] require a jury to fix the degree of murder, and if determined to be murder of the first degree, to fix the penalty to be suffered by the defendant and the trial judge has no duty other than to impose a sentence in accordance with the verdict.

In the *Brown* case the Supreme Court upheld the finding of the trial court that the name of a juror having been surreptitiously removed from the box, the panel was thus corrupted, and that such an act constituted legal justification for discharging the jury and declaring a mistrial.

The question of venue was raised in two cases:

In the *Graham* case, after quoting the statute relating to cases where injury is inflicted in one county and the injured party dies in another county,[29] the Supreme Court held that the "cause of death" was administered in the City and County of Denver, when the defendant caused the bomb to be placed in the airplane and out of his custody and beyond his control with the intent and for the purpose of causing the death of his mother, a passenger. Her death was the result of the defendant's unlawful act, and this unlawful

[24] 133 Colo. 497, 297 P.2d 538 (1956).
[25] Colo. Rev. Stat. Ann. § 40-19-3 (1953).
[26] 14 Colo. 413 (1890).
[27] See Colo. Rev. Stat. Ann. §§ 78-1-1 to 9 (1953).
[28] *Id.* § 40-2-3.
[29] *Id.* § 40-2-12.

act having occurred in the City and County of Denver, the venue was properly laid in that county.

In *Abeyta v. People*,[30] the testimony as to venue, though slight, was not contradicted. The defendants didn't offer evidence regarding the venue nor did they tender an instruction on the subject. The court held that where the evidence as to venue, even though slight, is not contradicted, the jury may find that the alleged crime was committed in the county where the trial took place, and there is sufficient proof of venue to justify denial of a motion for a directed verdict of not guilty on that ground.

Questions dealing with the constitutional provision against self-incrimination were considered in two recent cases:

In *People v. Schneider*[31] the defendants were indicted by a grand jury for malfeasance. Before the jury returned the indictments the defendants were subpoenaed before the grand jury and compelled to testify without being advised of their constitutional privilege against self-incrimination. The Supreme Court, in affirming the trial court's action in granting the motion to quash the indictment, held that courts have a duty to quash an indictment based upon testimony which violates a defendant's constitutional guarantee against self-incrimination. The court quoted from a Missouri case:

> "It is intolerable that one whose conduct is being investigated for the purpose of fixing on him a criminal charge should, in view of our constitutional mandate, be summoned to testify against himself, and furnish evidence upon which he may be indicted. It is a plain violation both of the letter and spirit of our organic law."[32]

Vigil v. People,[33] was the other case in which the question of self-incrimination was brought up. During the trial, the complaining witness was permitted to place a mask on the defendant's face so that she could positively identify him in the same manner he appeared on the night of the alleged robbery. Defendant objected on the ground that this violated the constitutional provision against

[30] 9 Colo. Bar Ass'n Adv. Sh. 124 (Jan. 14, 1957).
[31] 133 Colo. 173, 292 P.2d 982 (1956).
[32] State .v Faulkner, 175 Mo. 546, 75 S.W. 116 (1903).
[33] 300 P.2d 545 (1956).

self-incrimination. The Supreme Court upheld the trial court saying that the provision against self-incrimination is limited to protection against testimonial compulsion and does not extend to the exclusion of the body as evidence when such evidence may be relevant and material. Our constitution protects one against an admission of guilt coming from his own lips under compulsion and against the will of the accused and has no relation whatever to real as distinguished from testimonial evidence.

The balance of this review will refer to decisions in which the court was confronted with assignments of error pertaining to evidence and instructions.

In three homicide cases the court again reaffirmed the general rule followed in Colorado that if there is any evidence, however slight and however improbable, which could conceivably reduce a homicide to manslaughter, the defendant is entitled to an instruction thereon.[34]

In *Medina v. People*,[35] the court held that it is always competent to present evidence to challenge the credibility of an adverse witness by proof of independent facts and circumstances with his or her testimony even though such evidence may show the commission of another act or acts which might amount to a

[34] Armijo v. People, 304 P.2d 633 (1956); Hardy v. People, 132 Colo. 201, 292 P.2d 973 (1956); Becksted v. People, 133 Colo. 72, 292 P.2d 189 (1956).
[35] 133 Colo. 67, 291 P.2d 1061 (1956).

crime. In the same case it was further held that our statute,[36] while requiring proof of a specific intent to do bodily harm to the person assaulted, does not relieve a defendant of responsibility for the consequences of his unlawful act because the victim is other than the person he intended to harm. This is an application of the doctrine of transferred intent.

In *Becksted v. People*,[37] it was again held that a defendant in a first degree murder case has the right, without reference to a plea of insanity, to establish mental deficiency to form the specific intent essential to first degree murder. It was error to refuse to allow the testimony of a psychiatrist, not for the purpose of showing insanity, but as to the ability of the defendant to form the specific intent to kill. It was also held in this case that the affirmative defense of insanity must be treated as a criminal matter and the burden is on the State to prove sanity beyond a reasonable doubt.

In *Trujillo v. People*,[38] the defendant was convicted of involuntary manslaughter. In reversing the conviction, the court stated:

> "Ordinary or simple negligence is not sufficient to sustain a charge of involuntary manslaughter. We see no difference in the degree of negligence required to sustain a charge of manslaughter and that necessary to support a verdict in favor of a claimant in an action for damages under the guest statute. In each instance, the essential ingredient is a wanton and wilful disregard of the rights and safety of others."[39]

In *Lutz v. People*,[40] the defendant in a murder case offered testimony of good character some four or five years prior to the event which was basis of the charge. In upholding the trial court's rejection of such evidence as having no probative value, the Supreme Court said:

> "A defendant in a criminal prosecution may introduce evidence of his good character and reputation provided such testimony is confined to the particular traits involved in the offense charged, and is not too remote. The limit of time which would make such evidence too remote, hence inadmissable, cannot be fixed definitely and each case must of necessity depend on its own facts and circumstances, the matter resting in the sound judicial discretion of the trial court."[41]

In the same case it was held that no error is committed if a trial court refuses to give a requested instruction but covers the subject matter of the refused instruction by one which is submitted to the jury.

In considering the question of implied malice, the court said:

> "Implied malice must of necessity be established by all the facts and circumstances surrounding the crime. The perpetrator may testify as to his state of mind and heart at the time of the homicide, but the jury can do no other than to resolve the

[36] Colo. Rev. Stat. Ann. § 40-2-34 (1953).
[37] 133 Colo. 72, 292 P.2d 189 (1956).
[38] 133 Colo. 186, 292 P.2d 980 (1956).
[39] *Id* at 189, 292 P.2d at 982.
[40] 133 Colo. 229, 293 P.2d 646 (1956).
[41] *Id*. at 233, 293 P.2d at 649.

matter of implied malice from the attendant facts and circumstances. Implied malice cannot be established as readily as a date on a calendar or the color of the clothing worn by the deceased at the time she met her death."[42]

In the *Graham* case, the court again held that oral and written confessions are direct evidence justifying the submission of a first degree murder instruction and that where a confession is admissable, it is admissable as an entire statement including that which is favorable as well as unfavorable to the party making it even though it may admit his participation in crimes other than that charged in the information.

In *Romero v. People,*[43] it was held that ownership in larceny cases may be laid either in the real owner or in the person in whose possession the property was at the time of the theft.

In *Self v. People,*[44] an extradition proceeding based on a parole violation in the demanding state, it was held that the guilt or innocence of the alleged fugitive may not be considered in extradition matters. Thus, where the record discloses duly authenticated documents showing that the accused is on parole, and because of some act has violated the conditions thereof, and parole authorities have revoked his parole and demanded his return, he is a fugitive from justice, and it is not only within the power of the governor of the asylum state to issue a warrant for his extradition, but his duty to do so.

In *Armijo v. People,*[45] it was held that other offenses may be shown in evidence when they are so interwoven with the principal transaction that it is necessary to show them in order to give a fair and true understanding of the offense which is charged.

And again, with reference to the question of implied malice, the following instruction was given and approved, and will no doubt become a stock instruction in future cases of the same type:

"If a sane person, without legal justification or excuse intentionally uses a deadly weapon upon the person of another at a vital part, and inflicts a mortal wound, under circumstances showing no considerable provocation, then intent to kill may be presumed or implied as an inference of fact from the act itself. . . ."[46]

In the same case the Supreme Court upheld the trial court's refusal to give an instruction on absence of motive since it is not necessary to prove a motive as an essential element in the crime of murder.

Finally, it should be noted that no less than twelve cases decided during the period covered by this review had one or more assignments of error based upon an alleged abuse of discretion by the trial court. The Supreme Court has refused, and undoubtedly will continue to refuse, to consider them as subject to review in the absence of a clear abuse of discretion.

[42] *Id.* at 236, 293 P.2d at 650.
[43] 304 P.2d 639 (1956).
[44] 133 Colo. 524, 297 P.2d 887 (1956).
[45] 304 P.2d 633 (1956).
[46] *Id.* at 637.